APPENDIX B

BOARD AND PETITIONER'S CORRESPONDENCE

Exhibit 1	TREX request for waiver of EIS requirements
Exhibit 2	Board's response to TREX's request for waiver of EIS requirements
Exhibit 3	TREX's request for waiver of the six month pre-filing notice and to retain Burns & McDonnell as the third-party consultant
Exhibit 4	Board's response to TREX's request for waiver of the six month pre-filing notice and to retain Burns & McDonnell as the third-party consultant

EXHIBIT 1

SLOVER & LOFTUS LLP
ATTORNEYS AT LAW
PETER A. PFOHL

October 2, 2018

Victoria Rutson, Director
Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Re: Docket No. FD 36186, *Texas Railway Exchange LLC – Construction and Operation Exemption – Galveston County, TX; Request to Prepare an Environmental Assessment*

Dear Ms. Rutson:

By this letter, the Applicant Texas Railway Exchange LLC ("TREX") requests the Office of Environmental Analysis ("OEA") find that an Environmental Assessment ("EA") rather than an Environmental Impact Statement ("EIS") should be prepared for the construction and operation of the above-referenced project ("TREX Project"). TREX submits the following in support of this request.

Background

TREX intends in the near future to file with the STB a petition to construct and operate a line of track in Galveston, Texas. TREX has been in discussions with the OEA regarding the project for a number of months. Presently, BNSF Railway Company ("BNSF") trains destined to Texas International Terminals ("TIT") must move via reciprocal switch by the Union Pacific Railroad Company ("UP") under restrictive operating conditions and rules requiring several additional and unnecessary train movements, resulting in significant inefficiencies and delays. Additionally, UP has informed TIT that BNSF's existing access to TIT via reciprocal switch is provided by UP only on a voluntary basis.

The purpose of the TREX construction is to provide TIT with a permanent, direct, and more efficient connection between the BNSF's Valley Yard and TIT that is not dependent on UP service. This project will improve operational efficiency, reduce environmental impact and

better serve the business needs of TIT and third party shippers for receipt of inbound freight rail service.

On April 23, 2018, the OEA approved a waiver of the six-month pre-filing notice otherwise required under 49 C.F.R. § 1105.10(a)(1), and separately approved the selection of Burns & McDonnell ("B&M") as the third-party contractor to assist with preparation of the environmental documentation and review. Currently, the environmental documentation and review process is ongoing. B&M and OEA staff have performed site inspections. B&M, as directed by OEA staff, has also helped prepare and send out the environmental notification letters to local, state, and federal agencies. Based on the feedback received to date, there are no significant environmental issues or concerns that will need to be addressed, and therefore TREX is submitting this request that the OEA prepare an EA instead of an EIS.

Request to Prepare an Environmental Assessment

The Board's regulations provide that "Environmental Impact Statements will normally be prepared for rail construction proposals." 49 C.F.R. § 1105.6(a). However, 49 C.F.R. § 1105.6(d) provides: "in a rail construction, an applicant can seek to demonstrate (with supporting information addressing the pertinent aspects of § 1105.7(e)) that an EA, rather than an EIS, will be sufficient because the particular proposal is not likely to have a significant environmental impact."[1] Here, a finding that an EA will be sufficient is appropriate because the proposed construction and operation over the track is unlikely to have a significant environmental impact, including under the pertinent aspects of 49 C.F.R. § 1105.7(e):

1. Proposed Action and Alternatives

The TREX proposed construction is limited in scope as less than 3,000 feet of track will be required to connect the TIT loop track to the nearby BNSF Valley Yard.[2] The construction is not intended to result in changes to the type or volume of materials shipped to TIT. Currently, two alignments, the blue and the green routings are being evaluated as potential options. The blue route is preferred as this route limits the potential environmental impacts. *See*

[1] While normally requests to prepare an EA rather than an EIS are due with the prefiling notice, TREX was advised by OEA to await filing this request until after staff had conducted its on-site visit, which OEA has now completed.

[2] The attached Figure No. 1 illustrates the preferred "blue" routing and the extent of the potential areas impacted by TREX's proposed rail construction and operation of track from BNSF Railway's Valley Yard to TIT's facility. Figure No. 2 is the alternative "green" routing which produces some additional environmental impacts but still not significant environmental impacts.

Figure Nos. 1 and 2.[3] Given there is existing infrastructure restraining rail line connections and the project area is very limited in size, no other practical alternatives exist. The project anticipates efficiencies in both operations and maintenance associated with the reduction in car handling, switches and movements. The project also does not contemplate the expansion of the existing on-site TIT private track and facilities.

2. Effect on Local and Regional Transportation Systems

Both the referenced routings are parallel to existing rail lines, minimizing project impacts. The project will result in significant operational efficiency gains that will reduce locomotive use and switching time, reduce train turnaround times, reduce at-grade crossing train blockages, and streamline both UP and BNSF rail operations in the vicinity of TIT. For example, the project is expected to reduce the number of switching movements for BNSF unit trains destined to TIT by up to 82 percent.[4] The streamlined operations and reduced train delays will substantially benefit both the railroads and their shippers.

The disturbance from TREX's proposed rail construction and operation will be similar to the current use, but with measureable operational efficiencies, and will not result in substantial changes or diversion in local transportation systems and patterns. There is no significant projected increase in volume for BSNF unit trains or traffic to TIT's facility. The amount of traffic that TIT's facility can handle remains unchanged.

3. Land Use

The TREX Project will not modify existing land use. The project area is in the City of Galveston, in an area zoned as "Industrial, Heavy,"[6] which is defined by the City of Galveston's land development regulations as a zone "intended to accommodate intense industrial uses plus certain other activities that require careful location to limit risks to public health and safety."[7] Additionally, all immediately affected properties either are adjacent to existing track or

[3] *See also* R.L. Banks & Associates, Inc. ("RLBA") letter to B&M dated September 14, 2018, which addresses the preferred routing; Johnson, Mirmiran & Thompson ("JMT") letter report dated October 1, 2018 (enclosed as Attachment 1).

[4] RLBA letter to the City of Galveston dated September 7, 2018.

[6] City of Galveston - Zoning, http://galveston.maps.arcgis.com/apps/webappviewer/index.html?id=d2e9b86c8c704919bcfe9b111763914c (accessed Sept. 21, 2018).

[7] Land Development Regulations, City of Galveston, Tex. (Updated Apr. 2018) at 1-5, www.galvestontx.gov/DocumentCenter/View/3324/City-of-Galveston-LDR-Final---Updated-April-2018?bidId=.

have an existing rail right-of-way. As such, there will be no impact to prime farmland,[8] residential areas, schools, or cemeteries by this project.

4. Energy

While the scope and nature of this project is limited with regard to land impact there are significant increases in overall energy efficiency. The TREX Project will increase energy efficiency as a result of up to a 82 percent reduction of locomotive use and switching time as well as reduced train turnaround times, reduced at-grade crossing train blockages, and streamlined UP and BNSF rail operations in the vicinity of TIT. The project will not result in any diversions from rail to truck, or lead to any increases in truck traffic.

5. Air and Noise

In its comments to the OEA, the Texas Commission on Environmental Quality confirms that the project is in an area "currently classified by the United States Environmental Protection Agency as moderate nonattainment for the 2008 ozone National Ambient Air Quality Standard."[9] However, the project will not result in an increase in rail traffic of at least 50 percent (or an increase of at least three trains a day), or an increase in rail yard activity of at least 20 percent. Also, as referenced above, there will be no increase in truck traffic.

Based on current operational plans, there will be a reduction in locomotive and vehicle emissions because:

- There will be a decrease in the number of switching moves for BNSF unit trains destined to TIT;
- The number of times Old Port Industrial Road will need to be crossed will be significantly reduced; and
- Typically, the BNSF unit trains will be cut at the BNSF Valley Yard making it possible to bring them directly onto TIT's loop track.

Additionally, given the lack of train/yard activity increases, there are no new noise concerns requiring additional analysis.

[8] Letter from U.S. Dep't of Agric. to OEA dated July 2, 2018 for STB Docket No. FD 36186 ("The proposed site does not involve areas of Prime Farmland.").

[9] Letter from Tex. Comm'n on Envtl. Quality to OEA dated June 28, 2018 for STB Docket No. FD 36186.

6. Safety

The TREX Project will benefit public health and safety, through reduced locomotive run times and air emissions, and reduced switching activities. Most significantly, the TREX Project will make it safer for vehicular traffic on Old Port Industrial Road as it will reduce the total number of times BNSF unit trains destined to TIT will need to cross the at-grade crossing by up to 71 percent.[10]

Presently, the only hazardous material or substance as identified in the appendix to 49 C.F.R. § 172.101 that is received by TIT is ethanol. It is expected that the composition and volume of hazmat traffic destined to TIT's facility will remain unchanged as a result of the TREX Project.

7. Biological Resources, Water, Historic Resources, and Mitigation

There will be a limited impact on aquatic resources resulting from the TREX Project. TREX's rail engineer has determined the preferred blue routing can be constructed so that only 0.099 acres of aquatic resources is potentially impacted.[11] However, due to the location of the green routing in some locations not being immediately adjacent to the existing rail right-of-way, it is expected this routing will generally result in a greater, but not a significant, disturbance and potentially impacts up to 0.415 acres of aquatic resources.[12] Of note, the green route will require more extensive permitting and mitigation under section 404 of the Clean Water Act and as such, TREX supports the blue route as the preferred option.[13] Specifically, as presented in the letter report by Johnson, Mirmiran & Thompson ("JMT") dated October 1, 2018 (attached), the blue route would likely qualify for a Nationwide Permit ("NWP") 14; whereas, the green route would require an Individual Permit and mitigation for at least 0.232 acres of tidally influenced waters and wetlands.[14]

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[10] RLBA letter to the City of Galveston dated September 7, 2018.

[11] The preferred routing potentially impacts only 0.099 acres of aquatic resources. *See* R.L. Banks & Associates, Inc. ("RLBA") letter to B&M dated September 14, 2018 and the accompanying Figure No.1, which illustrates the areas potentially impacted by the preferred blue routing.

[12] *See* Figure 8A from the Wetland Delineation Report prepared by Spirit Envtl. (Aug. 7, 2018). A total of 0.415 acres of aquatic features were identified for the green routing, but this includes a 0.024 acre stormwater detention pond.

[13] *See* JMT letter to Slover & Loftus LLP dated October 2, 2018, which discusses the permitting requirements and costs for the blue and green routes (enclosed as Attachment 2).

[14] *Id*.

While there are species listed as threatened or endangered in Galveston County, Texas, both the green and blue routes are in an industrial area with limited habitat. However, as a precaution, prior to construction TREX will perform a survey of the potentially impacted areas for any state and federally listed animal and plant species to verify they are not present. Additionally, as advised by Texas Parks and Wildlife,[15] if it is necessary to remove vegetation or ground cover from March 15 through September 15, TREX will perform a survey to confirm there are no nests of migratory birds or offspring that could be affected.

It is unlikely there are significant historic resources that would be impacted. Notably, the Texas Historical Commission submitted to OEA a stamped and signed copy of the environmental consultation letter on June 19, 2018, stating that "No Historic Properties Affected Project May Proceed."

Conclusion

For the reasons cited herein, TREX respectfully requests that the OEA prepare an EA in this proceeding. Please advise if OEA requires any additional information from TREX regarding the nature or operation of the proposed track construction.

Sincerely,

Peter A. Pfohl
An Attorney for Texas Railway Exchange LLC

Enclosures

[15] Letter from Tex. Parks & Wildlife to OEA dated July 16, 2018 for STB Docket No. FD 36186.

October 2, 2018

Mr. Peter A. Pfohl
Ms. Katherine F. Waring
Slover & Loftus LLP
1224 Seventeenth Street, N.W.
Washington, DC 20036

RE: Texas Railway Exchange LLC
Track Construction in Galveston County, Texas

Dear Mr. Pfohl and Ms. Waring:

Johnson, Mirmiran & Thompson (JMT) is pleased to submit this letter report to you and Slover & Loftus LLP (S&L) to provide an analysis of the wetland permitting requirements and costs related the above referenced project being developed by Texas Railway Exchange LLC (TREX). As you are aware, I previously managed a wetland delineation under contract with Spirit Environmental LLC (Spirit) for two alternative routes (i.e., the "Blue" Alternative and the "Green" Alternative) associated with this project. Spirit prepared a *Wetland Delineation Report* dated August 8, 2018 that details the potentially jurisdictional aquatic resources that were surveyed within the limits of both alternatives. Figures 8A and 8B from Spirit's report, attached herein for reference, depict the size and locations of the potentially jurisdictional aquatic resources. Table 1 below summarizes the aquatic features surveyed within the areas potentially impacted by each alternative.

Table 1: Delineated Aquatic Resources

Blue Alternative		Green Alternative	
Feature Name	**Resource Size (Acres)**	**Feature Name**	**Resource Size (Acres)**
Water 1*	0.099	Water 1*	0.099
Water 2*	0.017	Water 2*	0.060
SWD1	0.003	SWD1	0.024
EEM1*	0.035	EEM1*	0.232
Total Size	**0.154**	**Total Size**	**0.415**

*Tidally Influenced Waters/Wetlands

Subsequently, TREX's rail engineer with R.L. Banks & Associates (RLBA) reviewed Spirit's *Wetland Delineation Report* and concluded that the "*blue routing can avoid all wetland areas identified by Spirit Environmental east of where TREX's proposed track will intersect the existing track, south of State Highway 275. However, the 0.099 acres of tidal waters located west of the proposed track crossing cannot be avoided and TREX's proposed construction most likely will affect this aquatic resource*." See RLBA letter to Stephen G. Thornhill of Burns & McDonnell dated September 14, 2018 (copy of which is attached herein). From this, Table 2 provides an estimate of the proposed impacts associated with each alternative, considering the avoidance and minimization efforts proposed by RLBA.

Table 2: Anticipated Project Impacts

Blue Alternative		Green Alternative	
Feature Name	**Impact Size (Acres)**	**Feature Name**	**Impact Size (Acres)**
Water 1*	0.099	Water 1*	0.099
Water 2*	Avoided	Water 2*	0.060
SWD1	Avoided	SWD1	0.024
EEM1*	Avoided	EEM1*	0.232
Total Impact Size	**0.099**	**Total Size**	**0.415**

*Tidally Influenced Waters/Wetlands

The type of project being contemplated (Linear Transportation) could potentially qualify for a Nationwide Permit (NWP) 14. In order to qualify for an NWP 14, no more than 1/3 acre of tidal waters of the U.S. can be impacted, therefore the Blue Alternative would qualify to be permitted under NWP 14. The impacts associated with the Green Alternative exceed allowable NWP 14 limits, thus a Standard Individual Permit (IP) would be necessary to permit the Green Alternative. Based upon the anticipated impacts depicted in Table 2, permitting specifications associated with each alternative for authorization to discharge fill into jurisdictional waters of the U.S. under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act are included in Table 3.

Table 3: Permitting Specifications

	Blue Alternative	Green Alternative
Permit Type	NWP 14	IP
Notification Requirement	No Pre-Construction Notification (PCN) Required*	PCN with Alternatives Analysis and Mitigation Plan
Typical Permit Timeframe**	45 days	12-18 months**
Permit Commitments	Compliance with NWP General and Regional Conditions^ and No Mitigation Requirement^^	Mitigation for 0.232 acres of EEM wetlands^^^ will be required. National Marine Fisheries Service may require mitigation for impacts to 0.159 acres of tidal waters^^^.
Approximate Permit Cost Estimates%	$0	Estimated Total: $1,350,000 Permit Application: $15,000 USACE Coordination: $10,000 Mitigation Planning%% & Design: $100,000 Land Acquisition: $500,000 Construction: $300,000 Monitoring/Maintenance: $100,000 Long Term Stewardship: $100,000 Contingency (20%): $225,000

* Under NWP 14, no PCN is required if less than 1/10 acre of waters of U.S. will be impacted
** Assuming submittal of an administratively complete permit application
** IP timeframe can be greater based on USACE workload and amount/degree of public scrutiny received during public review
^ Copy of General and Regional Conditions are attached
^^ NWP General Condition 23 does not require mitigation for projects that impact less than 1/10 acre of waters of U.S.
^^^ No wetland mitigation banks are available for the geographic location of the proposed impacts, thus permittee-respons ble mitigation would be required.
% Includes a rough, high-level approximation of costs associated with permit application preparation; coordination with USACE; and mitigation planning, design, land acquisition, construction, monitoring/maintenance, and long-term stewardship. This estimate does not constitute an official quote for professional services.
%%Assumes a 7:1 mitigation ratio and that approximately 3 acres of mitigation will be required

In conclusion, both the cost and timeframes associated with implementation of the Blue Alternative are far less than those of the Green Alternative. The Blue Alternative can be permitted under a non-notifying NWP 14, while the Green Alternative will require permitting under a Standard IP. The timeframe associated with a standard IP is significantly longer than that of an NWP. It is expected that if the Green Alternative is implemented instead of the Blue Alternative that the project would be delayed by 10.5 to 16.5 months. In addition to delay, the costs associated with permitting the Green Alternative (approximately $1.35 million) are significantly greater than the Blue Alternative ($0). This is because the Green Alternative will require the preparation and submittal of a permit application to the USACE for review and processing, which would include an alternatives analysis and a permittee-responsible mitigation (PRM) plan. The development and implementation of the PRM would also add significant costs to the project because of the requisite planning and design, land acquisition, construction, monitoring and maintenance, and long-term stewardship.

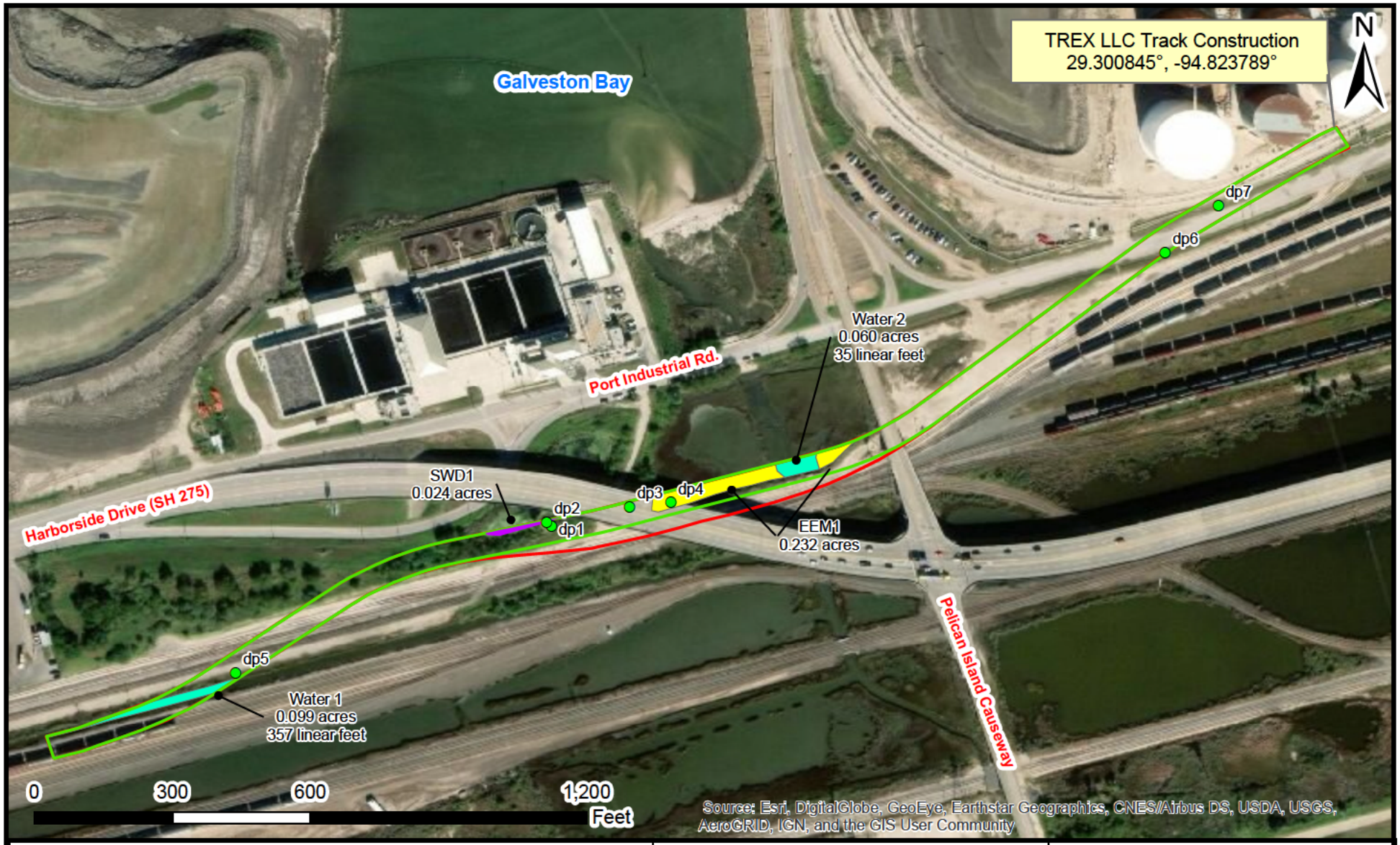
If you have any questions or need further information, please do not hesitate to contact me in the office at 346-307-3237, on my cell at 713-299-9030, or by email at rrobol@jmt.com.

Very truly yours,

JOHNSON, MIRMIRAN & THOMPSON, INC.

Ryan Robol
Section Head
Texas Natural & Cultural Resources

Figures 8A and 8B



Legend

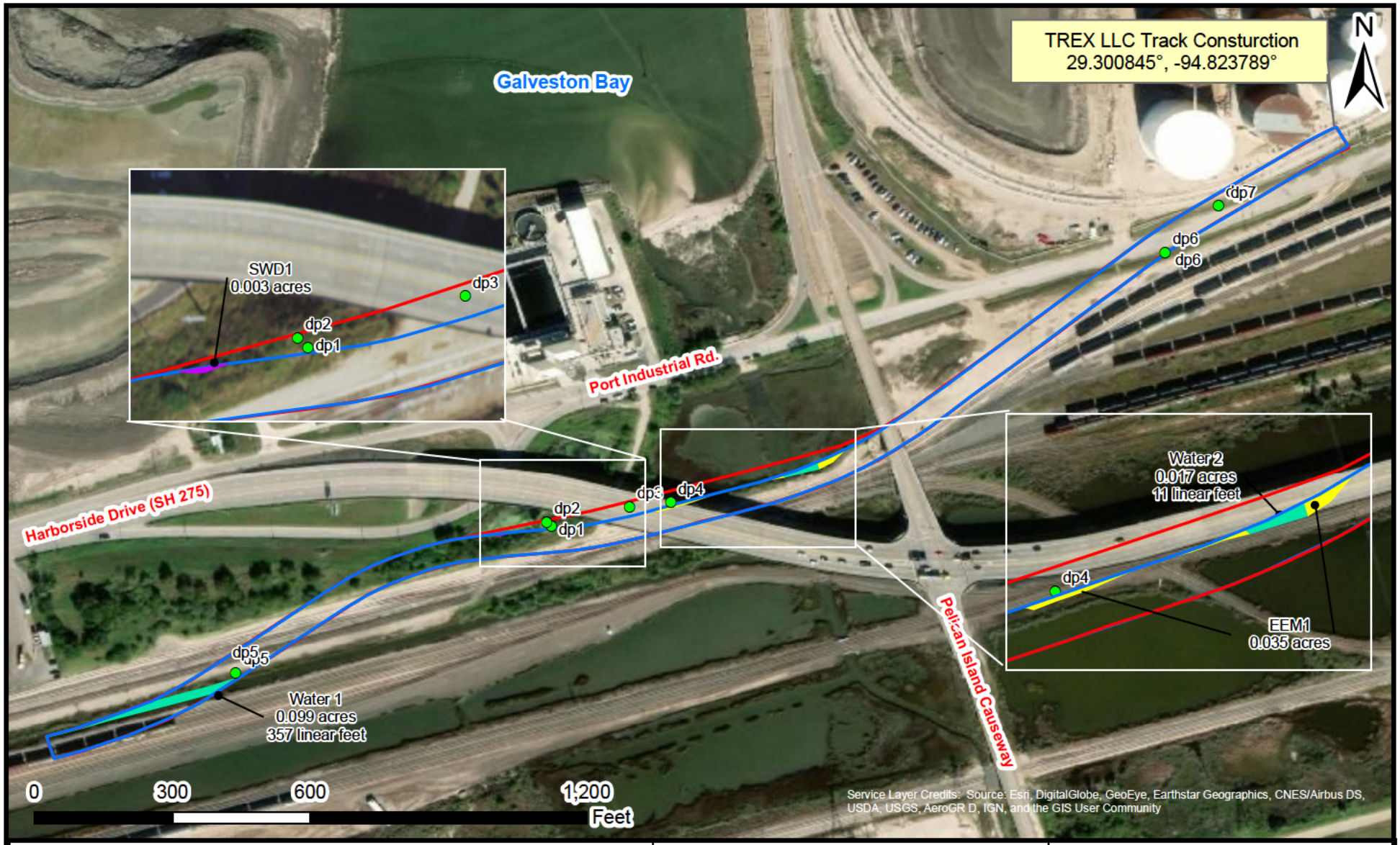
- TREX Composite Study Area Boundary
- Proposed Green Route Project Boundary
- Sample Points
- Stormwater Detention Pond (0.024 acres)
- Tidal Wetlands (0.232 acres)
- Tidal Waters (0.156 acres)

TREX LLC TRACK CONSTRUCTION
AQUATIC FEATURES MAP - GREEN ROUTE
TEXAS RAILWAY EXCHANGE, LLC
GALVESTON COUNTY, TEXAS

SPIRIT ENVIRONMENTAL
20465 State Highway 249, Suite 300
Houston, TX 77070

Figure No.: 8A
Date: 8/7/2018
Project No.: 18494.00F
Drawn By: AIngram

Note: This is not a Property Boundary Survey



Legend

- TREX Composite Study Area Boundary
- Proposed Blue Route Project Boundary
- Sample Points
- Tidal Wetlands (0 035 acres)
- Tidal Waters (0.116 acres)
- Stormwater Detention Pond (0.003 acres)

TREX LLC TRACK CONSTRUCTION
AQUATIC FEATURES MAP - BLUE ROUTE
TEXAS RAILWAY EXCHANGE, LLC
GALVESTON COUNTY, TEXAS

SPIRIT ENVIRONMENTAL
20465 State Highway 249, Suite 300
Houston, TX 77070

Figure No.: 8B
Date: 8/8/2018
Project No.: 18494.00F
Drawn By: AIngram

Note: This is not a Property Boundary Survey

R.L. Banks & Associates Letter Dated September 14, 2018

R.L. BANKS & ASSOCIATES, INC.
ECONOMICS | ENGINEERING | SERVICE PLANNING

VIA Email

September 14, 2018

Mr. Stephen G. Thornhill
Project Manager
Environmental Studies & Permitting
Burns & McDonnell
9400 Ward Parkway
Kansas City, MO 64114

RE: Texas Railway Exchange – Construction & Operation – Galveston County, Texas, STB Docket No. FD 36186

Dear Mr. Thornhill:

R.L. Banks & Associates, Inc. ("RLBA") has been retained by Texas Railway Exchange LLC ("TREX") to assist it in developing the construction and operating plans for TREX's proposed common carrier railroad in the above-referenced proceeding before the U.S. Surface Transportation Board (STB). RLBA is a national firm providing railroad economics, engineering and operations planning consulting services to freight railroads and shippers for over 62 years. The purpose of this letter report is to provide additional information regarding the proposed limits of potential disturbance associated with TREX's proposed construction, as RLBA has determined that TREX's preferred routing can avoid almost all aquatic resources using existing and available construction methods.

RLBA has reviewed Spirit Environmental's *Wetland Delineation Report* dated August 8, 2018 and specifically Figure Nos. 6, 7, 8A and 8B, which depict the extent of the areas potentially impacted by TREX's construction and delineate the aquatic resources. Based on this review, knowledge of the alignment of the proposed routings, and an understanding of existing available construction methods, it is RLBA's opinion that TREX's preferred blue routing can avoid all wetland areas identified by Spirit Environmental east of where TREX's proposed track will intersect the existing track, south of State Highway 275. However, the 0.099 acres of tidal waters located west of the proposed track crossing cannot be avoided and TREX's proposed construction most likely will affect this aquatic resource. See attached Figure No. 1, prepared by Spirit Environmental, which reflects TREX's preferred blue alignment as drawn by RLBA and which illustrates the proposed limits of potential disturbance and impacted aquatic resources as identified by Spirit.

WASHINGTON, D.C. AREA OFFICE
2107 Wilson Boulevard, Suite 750 | Arlington, VA 22201 | Tel: 703.276.7522 | Fax: 571.223.5217 | www.rlbadc.com

The construction methods that will be used to avoid the wetland areas and water resources located east of the proposed crossing location include, but are not limited to, the following:

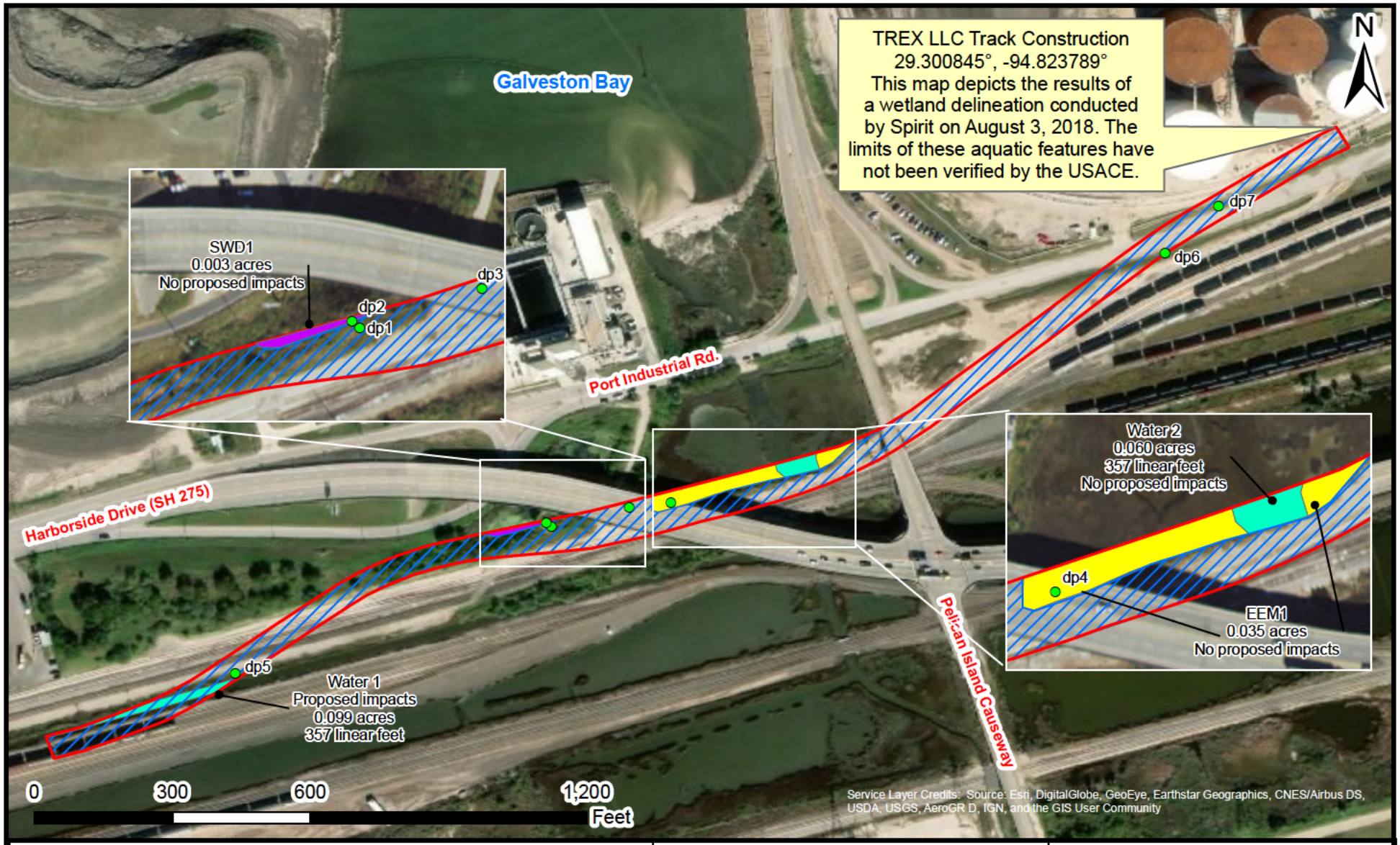
- No construction equipment will occupy the Spirit-delineated wetlands;
- At any location where the sloped portion of the "Blue Route Roadbed" would potentially encroach upon the wetlands, sheet piling or large rip rap will be installed to protect the horizontal component of the track roadbed and
- At any location where the walkway for train personnel may extend over wetlands, *i.e.* the "Water 2" location, a cantilevered walkway will be provided.

In summary, it is RLBA's opinion that construction of TREX's preferred blue routing as currently designed will only impact the tidal water area measuring 0.099 acres located west of the proposed crossing and that it will be possible to avoid all other aquatic resources as identified in Spirit Environmental's *Wetland Delineation Report*.

Sincerely,

R. Lee Meadows, Jr. PE

Enclosure: Figure No.1, map of proposed limits of
potential disturbance and impacted aquatic resources



Legend

- Sample Points
- Delineation Boundary
- Proposed Limits of Disturbance
- Stormwater Detention Pond (0.024 acres)
- Tidal Wetlands (0 232 acres)
- Tidal Waters (0.159 acres)

TREX LLC TRACK CONSTRUCTION
AQUATIC FEATURES MAP
TEXAS RAILWAY EXCHANGE, LLC
GALVESTON COUNTY, TEXAS

SPIRIT ENVIRONMENTAL
20465 State Highway 249, Suite 300
Houston, TX 77070

Figure No.: 1
Date: 8/14/2018
Project No.: 18494.00F
Drawn By: EVDonato
Note: This is not a Property Boundary Survey

2017 Nationwide Permits General and Regional Conditions

tidal or lacustrine fringe wetlands or reef structures. The following conditions must be met:

(a) The structures and fill area, including sills, breakwaters, or reefs, cannot extend into the waterbody more than 30 feet from the mean high water line or ordinary high water mark, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects;

(b) The activity is no more than 500 feet in length along the bank, unless the district engineer waives this criterion by making a written determination concluding that the activity will result in no more than minimal adverse environmental effects;

(c) Coir logs, coir mats, stone, native oyster shell, native wood debris and other structural materials must be adequately anchored, of sufficient weight, or installed in a manner that prevents relocation in most wave action or water flow conditions, except for extremely severe storms;

(d) For living shorelines consisting of tidal or lacustrine fringe wetlands, native plants appropriate for current site conditions, including salinity, must be used;

(e) Discharges of dredged or fill material into waters of the United States, and reef structures in navigable waters, must be the minimum necessary for the establishment and maintenance of the living shoreline;

(f) The activity must be designed, constructed, and maintained so that it has no more than minimal adverse effects on water movement between the waterbody and the shore and the movement of aquatic organisms between the waterbody and the shore;

(g) The activity does not involve discharges of dredged or fill material into special aquatic sites, unless the district engineer waives this criterion by making a written determination concluding that the discharge will result in no more than minimal adverse environmental effects; and

(h) The living shoreline must be properly maintained as a living shoreline, which may require repairing sills, breakwaters, and reefs, replacing sand fills, and replanting vegetation after severe storms or erosion events. This NWP authorizes those maintenance and repair activities to the original permitted conditions.

This NWP does not authorize beach nourishment or land reclamation activities.

Notification: The permittee must submit a pre-construction notification to the district engineer prior to commencing the construction of the living shoreline. (See general condition 32.) The pre-construction notification must include a delineation of special aquatic sites (see paragraph (b)(4) of general condition 32). Pre-construction notification is not required for maintenance and repair activities for living shorelines unless required by applicable NWP general conditions or regional conditions. (Sections 10 and 404)

C. Nationwide Permit General Conditions

Note: To qualify for NWP authorization, the prospective permittee must comply with the following general conditions, as applicable, in addition to any regional or case-specific conditions imposed by the division engineer or district engineer. Prospective permittees should contact the appropriate Corps district office to determine if regional conditions have been imposed on an NWP. Prospective permittees should also contact the appropriate Corps district office to determine the status of Clean Water Act Section 401 water quality certification and/or Coastal Zone Management Act consistency for an NWP. Every person who may wish to obtain permit authorization under one or more NWPs, or who is currently relying on an existing or prior permit authorization under one or more NWPs, has been and is on notice that all of the provisions of 33 CFR 330.1 through 330.6 apply to every NWP authorization. Note especially 33 CFR 330.5 relating to the modification, suspension, or revocation of any NWP authorization.

1. *Navigation.* (a) No activity may cause more than a minimal adverse effect on navigation.

(b) Any safety lights and signals prescribed by the U.S. Coast Guard, through regulations or otherwise, must be installed and maintained at the permittee's expense on authorized facilities in navigable waters of the United States.

(c) The permittee understands and agrees that, if future operations by the United States require the removal, relocation, or other alteration, of the structure or work herein authorized, or if, in the opinion of the Secretary of the Army or his authorized representative, said structure or work shall cause unreasonable obstruction to the free navigation of the navigable waters, the permittee will be required, upon due notice from the Corps of Engineers, to remove, relocate, or alter the structural work or obstructions caused thereby, without expense to the United States. No claim shall be made against the United States on account of any such removal or alteration.

2. *Aquatic Life Movements.* No activity may substantially disrupt the necessary life cycle movements of those species of aquatic life indigenous to the waterbody, including those species that normally migrate through the area, unless the activity's primary purpose is to impound water. All permanent and temporary crossings of waterbodies shall be suitably culverted, bridged, or otherwise designed and constructed to maintain low flows to sustain the movement of those aquatic species.

3. *Spawning Areas.* Activities in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (*e.g.,* through excavation, fill, or downstream smothering by substantial turbidity) of an important spawning area are not authorized.

4. *Migratory Bird Breeding Areas.* Activities in waters of the United States that serve as breeding areas for migratory birds must be avoided to the maximum extent practicable.

5. *Shellfish Beds.* No activity may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWPs 4 and 48, or is a shellfish seeding or habitat restoration activity authorized by NWP 27.

6. *Suitable Material.* No activity may use unsuitable material (*e.g.,* trash, debris, car bodies, asphalt, etc.). Material used for construction or discharged must be free from toxic pollutants in toxic amounts (see section 307 of the Clean Water Act).

7. *Water Supply Intakes.* No activity may occur in the proximity of a public water supply intake, except where the activity is for the repair or improvement of public water supply intake structures or adjacent bank stabilization.

8. *Adverse Effects From Impoundments.* If the activity creates an impoundment of water, adverse effects to the aquatic system due to accelerating the passage of water, and/or restricting its flow must be minimized to the maximum extent practicable.

9. *Management of Water Flows.* To the maximum extent practicable, the pre-construction course, condition, capacity, and location of open waters must be maintained for each activity, including stream channelization and storm water management activities, except as provided below. The activity must be constructed to withstand expected high flows. The activity must not restrict or impede the passage of normal or high flows, unless the primary purpose of the activity is to impound water or manage high flows. The activity may alter the pre-construction course, condition, capacity, and location of open waters if

it benefits the aquatic environment (*e.g.,* stream restoration or relocation activities).

10. *Fills Within 100-Year Floodplains.* The activity must comply with applicable FEMA-approved state or local floodplain management requirements.

11. *Equipment.* Heavy equipment working in wetlands or mudflats must be placed on mats, or other measures must be taken to minimize soil disturbance.

12. *Soil Erosion and Sediment Controls.* Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date. Permittees are encouraged to perform work within waters of the United States during periods of low-flow or no-flow, or during low tides.

13. *Removal of Temporary Fills.* Temporary fills must be removed in their entirety and the affected areas returned to pre-construction elevations. The affected areas must be revegetated, as appropriate.

14. *Proper Maintenance.* Any authorized structure or fill shall be properly maintained, including maintenance to ensure public safety and compliance with applicable NWP general conditions, as well as any activity-specific conditions added by the district engineer to an NWP authorization.

15. *Single and Complete Project.* The activity must be a single and complete project. The same NWP cannot be used more than once for the same single and complete project.

16. *Wild and Scenic Rivers.* (a) No activity may occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a ''study river'' for possible inclusion in the system while the river is in an official study status, unless the appropriate Federal agency with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation or study status.

(b) If a proposed NWP activity will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a ''study river'' for possible inclusion in the system while the river is in an official study status, the permittee must submit a pre-construction notification (see general condition 32). The district engineer will coordinate the PCN with the Federal agency with direct management responsibility for that river. The permittee shall not begin the NWP activity until notified by the district engineer that the Federal agency with direct management responsibility for that river has determined in writing that the proposed NWP activity will not adversely affect the Wild and Scenic River designation or study status.

(c) Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency responsible for the designated Wild and Scenic River or study river (*e.g.,* National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service). Information on these rivers is also available at: *http://www.rivers.gov/.*

17. *Tribal Rights.* No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.

18. *Endangered Species.* (a) No activity is authorized under any NWP which is likely to directly or indirectly jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act (ESA), or which will directly or indirectly destroy or adversely modify the critical habitat of such species. No activity is authorized under any NWP which ''may affect'' a listed species or critical habitat, unless section 7 consultation addressing the effects of the proposed activity has been completed. Direct effects are the immediate effects on listed species and critical habitat caused by the NWP activity. Indirect effects are those effects on listed species and critical habitat that are caused by the NWP activity and are later in time, but still are reasonably certain to occur.

(b) Federal agencies should follow their own procedures for complying with the requirements of the ESA. If pre-construction notification is required for the proposed activity, Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation has not been submitted, additional ESA section 7 consultation may be necessary for the activity and the respective federal agency would be responsible for fulfilling its obligation under section 7 of the ESA.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, and shall not begin work on the activity until notified by the district engineer that the requirements of the ESA have been satisfied and that the activity is authorized. For activities that might affect Federally-listed endangered or threatened species or designated critical habitat, the pre-construction notification must include the name(s) of the endangered or threatened species that might be affected by the proposed activity or that utilize the designated critical habitat that might be affected by the proposed work. The district engineer will determine whether the proposed activity ''may affect'' or will have ''no effect'' to listed species and designated critical habitat and will notify the non-Federal applicant of the Corps' determination within 45 days of receipt of a complete pre-construction notification. In cases where the non-Federal applicant has identified listed species or critical habitat that might be affected or is in the vicinity of the activity, and has so notified the Corps, the applicant shall not begin work until the Corps has provided notification the proposed activities will have ''no effect'' on listed species or critical habitat, or until section 7 consultation has been completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(d) As a result of formal or informal consultation with the FWS or NMFS the district engineer may add species-specific permit conditions to the NWPs.

(e) Authorization of an activity by a NWP does not authorize the ''take'' of a threatened or endangered species as defined under the ESA. In the absence of separate authorization (*e.g.,* an ESA Section 10 Permit, a Biological Opinion with ''incidental take'' provisions, etc.) from the FWS or the NMFS, the Endangered Species Act prohibits any person subject to the jurisdiction of the United States to take a listed species, where ''take'' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. The word ''harm'' in the definition of ''take'' means an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns,

including breeding, feeding or sheltering.

(f) Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the FWS and NMFS or their world wide Web pages at *http://www.fws.gov/* or *http://www.fws.gov/ipac* and *http://www.nmfs.noaa.gov/pr/species/esa/* respectively.

19. *Migratory Birds and Bald and Golden Eagles.* The permittee is responsible for ensuring their action complies with the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. The permittee is responsible for contacting appropriate local office of the U.S. Fish and Wildlife Service to determine applicable measures to reduce impacts to migratory birds or eagles, including whether ''incidental take'' permits are necessary and available under the Migratory Bird Treaty Act or Bald and Golden Eagle Protection Act for a particular activity.

20. *Historic Properties.* (a) In cases where the district engineer determines that the activity may affect properties listed, or eligible for listing, in the National Register of Historic Places, the activity is not authorized, until the requirements of Section 106 of the National Historic Preservation Act (NHPA) have been satisfied.

(b) Federal permittees should follow their own procedures for complying with the requirements of section 106 of the National Historic Preservation Act. If pre-construction notification is required for the proposed NWP activity, Federal permittees must provide the district engineer with the appropriate documentation to demonstrate compliance with those requirements. The district engineer will verify that the appropriate documentation has been submitted. If the appropriate documentation is not submitted, then additional consultation under section 106 may be necessary. The respective federal agency is responsible for fulfilling its obligation to comply with section 106.

(c) Non-federal permittees must submit a pre-construction notification to the district engineer if the activity may have the potential to cause effects to any historic properties listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties. For such activities, the pre-construction notification must state which historic properties may be affected by the proposed work or include a vicinity map indicating the location of the historic properties or the potential for the presence of historic properties. Assistance regarding information on the location of or potential for the presence of historic resources can be sought from the State Historic Preservation Officer or Tribal Historic Preservation Officer, as appropriate, and the National Register of Historic Places (see 33 CFR 330.4(g)). When reviewing pre-construction notifications, district engineers will comply with the current procedures for addressing the requirements of Section 106 of the National Historic Preservation Act. The district engineer shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include background research, consultation, oral history interviews, sample field investigation, and field survey. Based on the information submitted and these efforts, the district engineer shall determine whether the proposed activity has the potential to cause an effect on the historic properties. Where the non-Federal applicant has identified historic properties on which the activity may have the potential to cause effects and so notified the Corps, the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects or that consultation under Section 106 of the NHPA has been completed.

(d) The district engineer will notify the prospective permittee within 45 days of receipt of a complete pre-construction notification whether NHPA section 106 consultation is required. Section 106 consultation is not required when the Corps determines that the activity does not have the potential to cause effects on historic properties (see 36 CFR 800.3(a)). If NHPA section 106 consultation is required and will occur, the district engineer will notify the non-Federal applicant that he or she cannot begin work until section 106 consultation is completed. If the non-Federal applicant has not heard back from the Corps within 45 days, the applicant must still wait for notification from the Corps.

(e) Prospective permittees should be aware that section 110k of the NHPA (16 U.S.C. 470h–2(k)) prevents the Corps from granting a permit or other assistance to an applicant who, with intent to avoid the requirements of Section 106 of the NHPA, has intentionally significantly adversely affected a historic property to which the permit would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the Corps, after consultation with the Advisory Council on Historic Preservation (ACHP), determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant. If circumstances justify granting the assistance, the Corps is required to notify the ACHP and provide documentation specifying the circumstances, the degree of damage to the integrity of any historic properties affected, and proposed mitigation. This documentation must include any views obtained from the applicant, SHPO/THPO, appropriate Indian tribes if the undertaking occurs on or affects historic properties on tribal lands or affects properties of interest to those tribes, and other parties known to have a legitimate interest in the impacts to the permitted activity on historic properties.

21. *Discovery of Previously Unknown Remains and Artifacts.* If you discover any previously unknown historic, cultural or archeological remains and artifacts while accomplishing the activity authorized by this permit, you must immediately notify the district engineer of what you have found, and to the maximum extent practicable, avoid construction activities that may affect the remains and artifacts until the required coordination has been completed. The district engineer will initiate the Federal, Tribal and state coordination required to determine if the items or remains warrant a recovery effort or if the site is eligible for listing in the National Register of Historic Places.

22. *Designated Critical Resource Waters.* Critical resource waters include, NOAA-managed marine sanctuaries and marine monuments, and National Estuarine Research Reserves. The district engineer may designate, after notice and opportunity for public comment, additional waters officially designated by a state as having particular environmental or ecological significance, such as outstanding national resource waters or state natural heritage sites. The district engineer may also designate additional critical resource waters after notice and opportunity for public comment.

(a) Discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, 44, 49, 50, 51, and 52 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, 38, and proposed NWP B, notification is required in accordance with general condition 32, for any activity proposed

in the designated critical resource waters including wetlands adjacent to those waters. The district engineer may authorize activities under these NWPs only after it is determined that the impacts to the critical resource waters will be no more than minimal.

23. *Mitigation.* The district engineer will consider the following factors when determining appropriate and practicable mitigation necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal:

(a) The activity must be designed and constructed to avoid and minimize adverse effects, both temporary and permanent, to waters of the United States to the maximum extent practicable at the project site (*i.e.,* on site).

(b) Mitigation in all its forms (avoiding, minimizing, rectifying, reducing, or compensating for resource losses) will be required to the extent necessary to ensure that the individual and cumulative adverse environmental effects are no more than minimal.

(c) Compensatory mitigation at a minimum one-for-one ratio will be required for all wetland losses that exceed 1/10-acre and require pre-construction notification, unless the district engineer determines in writing that either some other form of mitigation would be more environmentally appropriate or the adverse environmental effects of the proposed activity are no more than minimal, and provides an activity-specific waiver of this requirement. For wetland losses of 1/10-acre or less that require pre-construction notification, the district engineer may determine on a case-by-case basis that compensatory mitigation is required to ensure that the activity results in only minimal adverse environmental effects.

(d) For losses of streams or other open waters that require pre-construction notification, the district engineer may require compensatory mitigation to ensure that the activity results in no more than minimal adverse environmental effects. Compensatory mitigation for losses of streams should be provided through stream rehabilitation, enhancement, or preservation, since streams are difficult-to-replace resources (see 33 CFR 332.3(e)(3)).

(e) Compensatory mitigation plans for NWP activities in or near streams or other open waters will normally include a requirement for the restoration or enhancement, maintenance, and legal protection (*e.g.,* conservation easements) of riparian areas next to open waters. In some cases, the restoration of riparian areas may be the only compensatory mitigation required. Restored riparian areas should consist of native species. The width of the required riparian area will address documented water quality or aquatic habitat loss concerns. Normally, the riparian area will be 25 to 50 feet wide on each side of the stream, but the district engineer may require slightly wider riparian areas to address documented water quality or habitat loss concerns. If it is not possible to establish a riparian area on both sides of a stream, or if the waterbody is a lake or coastal waters, then restoring or establishing a riparian area along a single bank or shoreline may be sufficient. Where both wetlands and open waters exist on the project site, the district engineer will determine the appropriate compensatory mitigation (*e.g.,* riparian areas and/or wetlands compensation) based on what is best for the aquatic environment on a watershed basis. In cases where riparian areas are determined to be the most appropriate form of compensatory mitigation, the district engineer may waive or reduce the requirement to provide wetland compensatory mitigation for wetland losses.

(f) Compensatory mitigation projects provided to offset losses of aquatic resources must comply with the applicable provisions of 33 CFR part 332.

(1) The prospective permittee is responsible for proposing an appropriate compensatory mitigation option if compensatory mitigation is necessary to ensure that the activity results in no more than minimal adverse environmental effects. For the NWPs, the preferred mechanism for providing compensatory mitigation is mitigation bank credits or in-lieu fee program credits (see 33 CFR 332.3(b)(2) and (3)).

(2) Since the likelihood of success is greater and the impacts to potentially valuable uplands are reduced, restoration of these areas should be the first compensatory mitigation option considered.

(3) If permittee-responsible mitigation is the proposed option, the prospective permittee is responsible for submitting a mitigation plan. A conceptual or detailed mitigation plan may be used by the district engineer to make the decision on the NWP verification request, but a final mitigation plan that addresses the applicable requirements of 33 CFR 332.4(c)(2) through (14) must be approved by the district engineer before the permittee begins work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation (see 33 CFR 332.3(k)(3)).

(4) If mitigation bank or in-lieu fee program credits are the proposed option, the mitigation plan only needs to address the baseline conditions at the impact site and the number of credits to be provided.

(5) Compensatory mitigation requirements (*e.g.,* resource type and amount to be provided as compensatory mitigation, site protection, ecological performance standards, monitoring requirements) may be addressed through conditions added to the NWP authorization, instead of components of a compensatory mitigation plan.

(g) Compensatory mitigation will not be used to increase the acreage losses allowed by the acreage limits of the NWPs. For example, if an NWP has an acreage limit of 1/2-acre, it cannot be used to authorize any NWP activity resulting in the loss of greater than 1/2-acre of waters of the United States, even if compensatory mitigation is provided that replaces or restores some of the lost waters. However, compensatory mitigation can and should be used, as necessary, to ensure that an NWP activity already meeting the established acreage limits also satisfies the no more than minimal impact requirement for the NWPs.

(h) Permittees may propose the use of mitigation banks, in-lieu fee programs, or permittee-responsible mitigation. For activities resulting in the loss of marine or estuarine resources, permittee-responsible mitigation may be environmentally preferable if there are no mitigation banks or in-lieu fee programs in the area that have marine or estuarine credits available for sale or transfer to the permittee. For permittee-responsible mitigation, the special conditions of the NWP verification must clearly indicate the party or parties responsible for the implementation and performance of the compensatory mitigation project, and, if required, its long-term management.

(i) Where certain functions and services of waters of the United States are permanently adversely affected by a regulated activity, such as discharges of dredged or fill material into waters of the United States that will convert a forested or scrub-shrub wetland to a herbaceous wetland in a permanently maintained utility line right-of-way, mitigation may be required to reduce the adverse environmental effects of the activity to the no more than minimal level.

24. *Safety of Impoundment Structures.* To ensure that all impoundment structures are safely

designed, the district engineer may require non-Federal applicants to demonstrate that the structures comply with established state dam safety criteria or have been designed by qualified persons. The district engineer may also require documentation that the design has been independently reviewed by similarly qualified persons, and appropriate modifications made to ensure safety.

25. *Water Quality.* Where States and authorized Tribes, or EPA where applicable, have not previously certified compliance of an NWP with CWA section 401, individual 401 Water Quality Certification must be obtained or waived (see 33 CFR 330.4(c)). The district engineer or State or Tribe may require additional water quality management measures to ensure that the authorized activity does not result in more than minimal degradation of water quality.

26. *Coastal Zone Management.* In coastal states where an NWP has not previously received a state coastal zone management consistency concurrence, an individual state coastal zone management consistency concurrence must be obtained, or a presumption of concurrence must occur (see 33 CFR 330.4(d)). The district engineer or a State may require additional measures to ensure that the authorized activity is consistent with state coastal zone management requirements.

27. *Regional and Case-By-Case Conditions.* The activity must comply with any regional conditions that may have been added by the Division Engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the state, Indian Tribe, or U.S. EPA in its section 401 Water Quality Certification, or by the state in its Coastal Zone Management Act consistency determination.

28. *Use of Multiple Nationwide Permits.* The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3-acre.

29. *Transfer of Nationwide Permit Verifications.* If the permittee sells the property associated with a nationwide permit verification, the permittee may transfer the nationwide permit verification to the new owner by submitting a letter to the appropriate Corps district office to validate the transfer. A copy of the nationwide permit verification must be attached to the letter, and the letter must contain the following statement and signature:

''When the structures or work authorized by this nationwide permit are still in existence at the time the property is transferred, the terms and conditions of this nationwide permit, including any special conditions, will continue to be binding on the new owner(s) of the property. To validate the transfer of this nationwide permit and the associated liabilities associated with compliance with its terms and conditions, have the transferee sign and date below.''

_____

(Transferee)

_____

(Date)

30. *Compliance Certification.* Each permittee who receives an NWP verification letter from the Corps must provide a signed certification documenting completion of the authorized activity and implementation of any required compensatory mitigation. The success of any required permittee-responsible mitigation, including the achievement of ecological performance standards, will be addressed separately by the district engineer. The Corps will provide the permittee the certification document with the NWP verification letter. The certification document will include:

(a) A statement that the authorized activity was done in accordance with the NWP authorization, including any general, regional, or activity-specific conditions;

(b) A statement that the implementation of any required compensatory mitigation was completed in accordance with the permit conditions. If credits from a mitigation bank or in-lieu fee program are used to satisfy the compensatory mitigation requirements, the certification must include the documentation required by 33 CFR 332.3(l)(3) to confirm that the permittee secured the appropriate number and resource type of credits; and

(c) The signature of the permittee certifying the completion of the activity and mitigation.

The completed certification document must be submitted to the district engineer within 30 days of completion of the authorized activity or the implementation of any required compensatory mitigation.

31. *Activities Affecting Structures or Works Built by the United States.* If an NWP activity also requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers (USACE) federally authorized Civil Works project (a ''USACE project''), the prospective permittee must submit a pre-construction notification. See paragraph (b)(10) of general condition 32. An activity that requires section 408 permission is not authorized by NWP until the appropriate Corps district office issues the section 408 permission to alter, occupy, or use the USACE project, and the district engineer issues a written NWP verification.

32. *Pre-Construction Notification.* (a) *Timing.* Where required by the terms of the NWP, the prospective permittee must notify the district engineer by submitting a pre-construction notification (PCN) as early as possible. The district engineer must determine if the PCN is complete within 30 calendar days of the date of receipt and, if the PCN is determined to be incomplete, notify the prospective permittee within that 30 day period to request the additional information necessary to make the PCN complete. The request must specify the information needed to make the PCN complete. As a general rule, district engineers will request additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the district engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the district engineer. The prospective permittee shall not begin the activity until either:

(1) He or she is notified in writing by the district engineer that the activity may proceed under the NWP with any special conditions imposed by the district or division engineer; or

(2) 45 calendar days have passed from the district engineer's receipt of the complete PCN and the prospective permittee has not received written notice from the district or division engineer. However, if the permittee was required to notify the Corps pursuant to general condition 18 that listed species or critical habitat might be affected or in the vicinity of the activity, or to notify the Corps pursuant to general condition 20 that the activity may have the potential to cause effects to historic properties, the permittee cannot begin the activity until receiving written notification from the Corps that there is

''no effect'' on listed species or ''no potential to cause effects'' on historic properties, or that any consultation required under Section 7 of the Endangered Species Act (see 33 CFR 330.4(f)) and/or section 106 of the National Historic Preservation (see 33 CFR 330.4(g)) has been completed. Also, work cannot begin under NWPs 21, 49, or 50 until the permittee has received written approval from the Corps. If the proposed activity requires a written waiver to exceed specified limits of an NWP, the permittee may not begin the activity until the district engineer issues the waiver. If the district or division engineer notifies the permittee in writing that an individual permit is required within 45 calendar days of receipt of a complete PCN, the permittee cannot begin the activity until an individual permit has been obtained. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) *Contents of Pre-Construction Notification:* The PCN must be in writing and include the following information:

(1) Name, address and telephone numbers of the prospective permittee;

(2) Location of the proposed activity;

(3) Identify the specific NWP or NWP(s) the prospective permittee wants to use to authorize the proposed activity;

(4) A description of the proposed activity; the activity's purpose; direct and indirect adverse environmental effects the activity would cause, including the anticipated amount of loss of water of the United States expected to result from the NWP activity, in acres, linear feet, or other appropriate unit of measure; a description of any proposed mitigation measures intended to reduce the adverse environmental effects caused by the proposed activity; any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity, including other separate and distant crossings for linear projects that require Department of the Army authorization but do not require pre-construction notification. The description of the proposed activity and any proposed mitigation measures should be sufficiently detailed to allow the district engineer to determine that the adverse environmental effects of the activity will be no more than minimal and to determine the need for compensatory mitigation or other mitigation measures. For single and complete linear projects, the PCN must include the quantity of proposed losses of waters of the United States for each single and complete crossing of waters of the United States. Sketches should be provided when necessary to show that the activity complies with the terms of the NWP. (Sketches usually clarify the activity and when provided results in a quicker decision. Sketches should contain sufficient detail to provide an illustrative description of the proposed activity (*e.g.,* a conceptual plan), but do not need to be detailed engineering plans);

(5) The PCN must include a delineation of wetlands, other special aquatic sites, and other waters, such as lakes and ponds, and perennial, intermittent, and ephemeral streams, on the project site. Wetland delineations must be prepared in accordance with the current method required by the Corps. The permittee may ask the Corps to delineate the special aquatic sites and other waters on the project site, but there may be a delay if the Corps does the delineation, especially if the project site is large or contains many waters of the United States. Furthermore, the 45 day period will not start until the delineation has been submitted to or completed by the Corps, as appropriate;

(6) If the proposed activity will result in the loss of greater than 1/10-acre of wetlands and a PCN is required, the prospective permittee must submit a statement describing how the mitigation requirement will be satisfied, or explaining why the adverse environmental effects are no more than minimal and why compensatory mitigation should not be required. As an alternative, the prospective permittee may submit a conceptual or detailed mitigation plan.

(7) For non-Federal permittees, if any listed species or designated critical habitat might be affected or is in the vicinity of the activity, or if the activity is located in designated critical habitat, the PCN must include the name(s) of those endangered or threatened species that might be affected by the proposed activity or utilize the designated critical habitat that might be affected by the proposed activity. For any NWP activity that requires pre-construction notification, Federal permittees must provide documentation demonstrating compliance with the Endangered Species Act;

(8) For non-Federal permittees, if the NWP activity may have the potential to cause effects to a historic property listed on, determined to be eligible for listing on, or potentially eligible for listing on, the National Register of Historic Places, the PCN must state which historic property may have the potential to be affected by the proposed activity or include a vicinity map indicating the location of the historic property. For NWP activities that require pre-construction notification, Federal permittees must provide documentation demonstrating compliance with section 106 of the National Historic Preservation Act;

(9) For an activity that will occur in a component of the National Wild and Scenic River System, or in a river officially designated by Congress as a ''study river'' for possible inclusion in the system while the river is in an official study status, the PCN must identify the Wild and Scenic River or the ''study river'' (see general condition 16); and

(10) For an activity that requires permission from the Corps pursuant to 33 U.S.C. 408 because it will alter or temporarily or permanently occupy or use a U.S. Army Corps of Engineers federally authorized civil works project, the pre-construction notification must include a statement confirming that the project proponent has submitted a written request for section 408 permission from the Corps district having jurisdiction over that USACE project.

(c) *Form of Pre-Construction Notification:* The standard individual permit application form (Form ENG 4345) may be used, but the completed application form must clearly indicate that it is an NWP PCN and must include all of the applicable information required in paragraphs (b)(1) through (9) of this general condition. A letter containing the required information may also be used. Applicants may provide electronic files of PCNs and supporting materials.

(d) *Agency Coordination:* (1) The district engineer will consider any comments from Federal and state agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the activity's adverse environmental effects so that they are no more than minimal.

(2) Agency coordination is required for: (i) All NWP activities that require pre-construction notification and result in the loss of greater than 1/2-acre of waters of the United States; (ii) NWP 21, 29, 39, 40, 42, 43, 44, 50, 51, and 52 activities that require pre-construction notification and will result in the loss of greater than 300 linear feet of stream bed; (iii) NWP 13 activities in excess of 500 linear feet, fills greater than one cubic yard per running foot, or involve discharges of dredged or fill material into special aquatic sites; and (iv) proposed NWP B activities in excess of

500 linear feet, that extend into the waterbody more than 30 feet from the mean high water line or ordinary high water mark, or involve discharges into special aquatic sites.

(3) When agency coordination is required, the district engineer will immediately provide (*e.g.,* via email, facsimile transmission, overnight mail, or other expeditious manner) a copy of the complete PCN to the appropriate Federal or state offices (FWS, state natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO) or Tribal Historic Preservation Office (THPO), and, if appropriate, the NMFS). With the exception of NWP 37, these agencies will have 10 calendar days from the date the material is transmitted to telephone or fax the district engineer notice that they intend to provide substantive, site-specific comments. The comments must explain why the agency believes the adverse environmental effects will be more than minimal. If so contacted by an agency, the district engineer will wait an additional 15 calendar days before making a decision on the pre-construction notification. The district engineer will fully consider agency comments received within the specified time frame concerning the proposed activity's compliance with the terms and conditions of the NWPs, including the need for mitigation to ensure the net adverse environmental effects of the proposed activity are no more than minimal. The district engineer will provide no response to the resource agency, except as provided below. The district engineer will indicate in the administrative record associated with each pre-construction notification that the resource agencies' concerns were considered. For NWP 37, the emergency watershed protection and rehabilitation activity may proceed immediately in cases where there is an unacceptable hazard to life or a significant loss of property or economic hardship will occur. The district engineer will consider any comments received to decide whether the NWP 37 authorization should be modified, suspended, or revoked in accordance with the procedures at 33 CFR 330.5.

(4) In cases of where the prospective permittee is not a Federal agency, the district engineer will provide a response to NMFS within 30 calendar days of receipt of any Essential Fish Habitat conservation recommendations, as required by section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act.

(5) Applicants are encouraged to provide the Corps with either electronic files or multiple copies of pre-construction notifications to expedite agency coordination.

D. District Engineer's Decision

1. In reviewing the PCN for the proposed activity, the district engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. If a project proponent requests authorization by a specific NWP, the district engineer should issue the verification for that NWP if it meets the terms in the text of that NWP, unless he or she determines, after considering mitigation, that the proposed activity will result in more than minimal adverse environmental effects and exercises discretionary authority to require an individual permit for the proposed activity. For a linear project, this determination will include an evaluation of the individual crossings to determine whether they individually satisfy the terms and conditions of the NWP(s), as well as the cumulative effects caused by all of the crossings authorized by NWP. If an applicant requests a waiver of the 300 linear foot limit on impacts to streams or of an otherwise applicable limit, as provided for in NWPs 13, 21, 29, 36, 39, 40, 42, 43, 44, 50, 51, 52, or proposed NWP B, the district engineer will only grant the waiver upon a written determination that the NWP activity will result in only minimal adverse environmental effects.

2. When making minimal adverse environmental effects determinations the district engineer will consider the direct and indirect effects caused by the NWP activity. The district engineer will also consider site specific factors, such as the environmental setting in the vicinity of the NWP activity, the type of resource that will be affected by the NWP activity, the functions provided by the aquatic resources that will be affected by the NWP activity, the degree or magnitude to which the aquatic resources perform those functions, the extent that aquatic resource functions will be lost as a result of the NWP activity (*e.g.,* partial or complete loss), the duration of the adverse effects (temporary or permanent), the importance of the aquatic resource functions to the region (*e.g.,* watershed or ecoregion), and mitigation required by the district engineer. If an appropriate functional or condition assessment method is available and practicable to use, that assessment method may be used by the district engineer to assist in the minimal adverse environmental effects determination. The district engineer may add case-specific special conditions to the NWP authorization to address site-specific environmental concerns.

3. If the proposed activity requires a PCN and will result in a loss of greater than 1/10-acre of wetlands, the prospective permittee should submit a mitigation proposal with the PCN. Applicants may also propose compensatory mitigation for NWP activities with smaller impacts, or for impacts to other types of waters (*e.g.,* streams). The district engineer will consider any proposed compensatory mitigation or other mitigation measures the applicant has included in the proposal in determining whether the net adverse environmental effects of the proposed activity are no more than minimal. The compensatory mitigation proposal may be either conceptual or detailed. If the district engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse environmental effects are no more than minimal, after considering mitigation, the district engineer will notify the permittee and include any activity-specific conditions in the NWP verification the district engineer deems necessary. Conditions for compensatory mitigation requirements must comply with the appropriate provisions at 33 CFR 332.3(k). The district engineer must approve the final mitigation plan before the permittee commences work in waters of the United States, unless the district engineer determines that prior approval of the final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the district engineer will expeditiously review the proposed compensatory mitigation plan. The district engineer must review the proposed compensatory mitigation plan within 45 calendar days of receiving a complete PCN and determine whether the proposed mitigation would ensure the NWP activity results in no more than minimal adverse environmental effects. If the net adverse environmental effects of the NWP activity (after consideration of the mitigation proposal) are determined by the district engineer to be no more than minimal, the district engineer will provide a timely written response to the applicant. The response will state that the NWP activity can proceed under the terms and conditions of the NWP, including any activity-specific conditions added

to the NWP authorization by the district engineer.

4. If the district engineer determines that the adverse effects of the proposed activity are more than minimal, then the district engineer will notify the applicant either: (a) That the activity does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (b) that the activity is authorized under the NWP subject to the applicant's submission of a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level; or (c) that the activity is authorized under the NWP with specific modifications or conditions. Where the district engineer determines that mitigation is required to ensure no more than minimal adverse effects occur to the aquatic environment, the activity will be authorized within the 45-day PCN period (unless additional time is required to comply with general conditions 18, 20, and/or 31, or to evaluate PCNs for activities authorized by NWPs 21, 49, and 50), with activity-specific conditions that state the mitigation requirements. The authorization will include the necessary conceptual or detailed mitigation plan or a requirement that the applicant submit a mitigation plan that would reduce the adverse effects on the aquatic environment to the minimal level. When mitigation is required, no work in waters of the United States may occur until the district engineer has approved a specific mitigation plan or has determined that prior approval of a final mitigation plan is not practicable or not necessary to ensure timely completion of the required compensatory mitigation.

E. Further Information

1. District Engineers have authority to determine if an activity complies with the terms and conditions of an NWP.

2. NWPs do not obviate the need to obtain other federal, state, or local permits, approvals, or authorizations required by law.

3. NWPs do not grant any property rights or exclusive privileges.

4. NWPs do not authorize any injury to the property or rights of others.

5. NWPs do not authorize interference with any existing or proposed Federal project (see general condition 31).

F. Definitions

Best management practices (BMPs): Policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural.

Compensatory mitigation: The restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Currently serviceable: Useable as is or with some maintenance, but not so degraded as to essentially require reconstruction.

Direct effects: Effects that are caused by the activity and occur at the same time and place.

Discharge: The term ''discharge'' means any discharge of dredged or fill material into waters of the United States.

Enhancement: The manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

Ephemeral stream: An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral stream beds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Establishment (creation): The manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area.

High Tide Line: The line of intersection of the land with the water's surface at the maximum height reached by a rising tide. The high tide line may be determined, in the absence of actual data, by a line of oil or scum along shore objects, a more or less continuous deposit of fine shell or debris on the foreshore or berm, other physical markings or characteristics, vegetation lines, tidal gages, or other suitable means that delineate the general height reached by a rising tide. The line encompasses spring high tides and other high tides that occur with periodic frequency but does not include storm surges in which there is a departure from the normal or predicted reach of the tide due to the piling up of water against a coast by strong winds such as those accompanying a hurricane or other intense storm.

Historic Property: Any prehistoric or historic district, site (including archaeological site), building, structure, or other object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria (36 CFR part 60).

Independent utility: A test to determine what constitutes a single and complete non-linear project in the Corps Regulatory Program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases were not built can be considered as separate single and complete projects with independent utility.

Indirect effects: Effects that are caused by the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.

Intermittent stream: An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

Loss of waters of the United States: Waters of the United States that are permanently adversely affected by filling, flooding, excavation, or drainage because of the regulated activity. Permanent adverse effects include permanent discharges of dredged or fill material that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is a threshold measurement of the impact to jurisdictional waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and services. The loss of stream bed includes the acres or linear feet of stream bed that is filled or excavated as a result of the regulated activity. Waters of the United States temporarily filled,

flooded, excavated, or drained, but restored to pre-construction contours and elevations after construction, are not included in the measurement of loss of waters of the United States. Impacts resulting from activities that do not require Department of the Army authorization, such as activities eligible for exemptions under section 404(f) of the Clean Water Act are not considered when calculating the loss of waters of the United States.

Non-tidal wetland: A non-tidal wetland is a wetland that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(c)(4). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (*i.e.,* spring high tide line).

Open water: For purposes of the NWPs, an open water is any area that in a year with normal patterns of precipitation has water flowing or standing above ground to the extent that an ordinary high water mark can be determined. Aquatic vegetation within the area of flowing or standing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. Examples of ''open waters'' include rivers, streams, lakes, and ponds.

Ordinary High Water Mark: An ordinary high water mark is a line on the shore established by the fluctuations of water and indicated by physical characteristics, or by other appropriate means that consider the characteristics of the surrounding areas (see 33 CFR 328.3(c)(6)).

Perennial stream: A perennial stream has flowing water year-round during a typical year. The water table is located above the stream bed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

Practicable: Available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

Pre-construction notification: A request submitted by the project proponent to the Corps for confirmation that a particular activity is authorized by nationwide permit. The request may be a permit application, letter, or similar document that includes information about the proposed work and its anticipated environmental effects. Pre-construction notification may be required by the terms and conditions of a nationwide permit, or by regional conditions. A pre-construction notification may be voluntarily submitted in cases where pre-construction notification is not required and the project proponent wants confirmation that the activity is authorized by nationwide permit.

Preservation: The removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Re-establishment: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

Rehabilitation: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

Restoration: The manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: re-establishment and rehabilitation.

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Riffle and pool complexes sometimes characterize steep gradient sections of streams. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a course substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. A slower stream velocity, a streaming flow, a smooth surface, and a finer substrate characterize pools.

Riparian areas: Riparian areas are lands next to streams, lakes, and estuarine-marine shorelines. Riparian areas are transitional between terrestrial and aquatic ecosystems, through which surface and subsurface hydrology connects riverine, lacustrine, estuarine, and marine waters with their adjacent wetlands, non-wetland waters, or uplands. Riparian areas provide a variety of ecological functions and services and help improve or maintain local water quality. (See general condition 23.)

Shellfish seeding: The placement of shellfish seed and/or suitable substrate to increase shellfish production. Shellfish seed consists of immature individual shellfish or individual shellfish attached to shells or shell fragments (*i.e.,* spat on shell). Suitable substrate may consist of shellfish shells, shell fragments, or other appropriate materials placed into waters for shellfish habitat.

Single and complete linear project: A linear project is a project constructed for the purpose of getting people, goods, or services from a point of origin to a terminal point, which often involves multiple crossings of one or more waterbodies at separate and distant locations. The term ''single and complete project'' is defined as that portion of the total linear project proposed or accomplished by one owner/developer or partnership or other association of owners/developers that includes all crossings of a single water of the United States (*i.e.,* a single waterbody) at a specific location. For linear projects crossing a single or multiple waterbodies several times at separate and distant locations, each crossing is considered a single and complete project for purposes of NWP authorization. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies, and crossings of such features cannot be considered separately.

Single and complete non-linear project: For non-linear projects, the term ''single and complete project'' is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers. A single and complete non-linear project must have independent utility (see definition of ''independent utility''). Single and complete non-linear projects may not be ''piecemealed'' to avoid the limits in an NWP authorization.

Stormwater management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and best management practices, which retain water for a period of time to control runoff and/or

improve the quality (*i.e.,* by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the stream bed, but outside of the ordinary high water marks, are not considered part of the stream bed.

Stream channelization: The manipulation of a stream's course, condition, capacity, or location that causes more than minimal interruption of normal stream processes. A channelized stream remains a water of the United States.

Structure: An object that is arranged in a definite pattern of organization. Examples of structures include, without limitation, any pier, boat dock, boat ramp, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, artificial island, artificial reef, permanent mooring structure, power transmission line, permanently moored floating vessel, piling, aid to navigation, or any other manmade obstacle or obstruction.

Tidal wetland: A tidal wetland is a wetland (*i.e.,* water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(c)(4) and (d), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line, which is defined at 33 CFR 328.3(c)(7).

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: For purposes of the NWPs, a waterbody is a jurisdictional water of the United States. If a wetland is adjacent to a waterbody determined to be a water of the United States under 33 CFR 328.3(a)(1) through (5), that waterbody and any adjacent wetlands are considered together as a single aquatic unit (see 33 CFR 328.4(c)(2)). Examples of ''waterbodies'' include streams, rivers, lakes, ponds, and wetlands.

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2017 NATIONWIDE PERMIT (NWP) REGIONAL CONDITIONS

FOR THE STATE OF TEXAS

The following regional conditions apply within the entire State of Texas:

1. For all discharges proposed for authorization under Nationwide Permits (NWP) 3, 6, 7, 12, 14, 18, 19, 21, 23, 25, 27, 29, 39, 40, 41, 42, 43, 44, 49, 51, and 52, into the following habitat types or specific areas, the applicant shall notify the appropriate District Engineer in accordance with the NWP General Condition 32, Pre-Construction Notification (PCN). The Corps of Engineers (Corps) will coordinate with the resource agencies as specified in NWP General Condition 32(d) (PCN). The habitat types or areas are:

    a. Pitcher Plant Bogs: Wetlands typically characterized by an organic surface soil layer and include vegetation such as pitcher plants (*Sarracenia* spp.) and/or sundews (*Drosera* spp.).

    b. Bald Cypress-Tupelo Swamps: Wetlands dominated by bald cypress (*Taxodium distichum*) and/or water tupelo (*Nyssa aquatic*).

2. For all activities proposed for authorization under any Nationwide Permit (NWP) at sites approved as compensatory mitigation sites (either permittee-responsible, mitigation bank and/or in-lieu fee) under Section 404 of the Clean Water Act and/or Section 10 of the Rivers and Harbors Act of 1899, the applicant shall notify the appropriate District Engineer in accordance with the NWP General Condition 32 - Pre-Construction Notification prior to commencing the activity.

3. For all activities proposed for authorization under NWP 16, the applicant shall notify the appropriate District Engineer in accordance with the NWP General Condition 32 (Pre-Construction Notification) and must obtain an individual water quality certification (WQC) from the TCEQ. Work cannot begin under NWP 16 until the applicant has received written approval from the Corps and WQC.

NOTE: For all activities proposing to use equipment that has operated or been stored in a water body on the Texas list of zebra mussel (*Dreissena polymorpha*) infected water bodies, equipment should be decontaminated prior to relocation in accordance with Texas Administrative Code, Title 31, Part 2, Chapter 57, Subchapter A. The following decontamination Best Management Practices (BMPs), as a minimum, are indicated:

    a. Clean: Clean both the inside and outside of equipment and gear, by removing all plants, animals, and mud and thoroughly washing the equipment using a high pressure spray nozzle.

    b. Drain: Drain all water from receptacles before leaving the area, including livewells, bilges, ballast, and engine cooling water on boats.

    c. Dry: Allow time for your equipment to dry completely before relocating in other waters. Equipment should be dried prior to relocation. High temperature pressure washing (greater than or equal to 140F) or professional cleaning may be substituted for drying time.

The following regional condition only applies within the Albuquerque, Fort Worth, and Galveston Districts:

4. For all activities proposed for authorization under Nationwide Permit (NWP) 12 that involve a discharge of fill material associated with mechanized land clearing of wetlands dominated by native woody shrubs, the applicant shall notify the appropriate District Engineer in accordance with the NWP General Condition 32 – Pre-Construction Notification prior to commencing the activity. For the purpose of this regional condition, a shrub dominated wetland is characterized by woody vegetation less than 3.0 inches in diameter at breast height but greater than 3.2 feet in height, which covers 20% or more of the area. Woody vines are not included.

The following regional conditions apply within the Albuquerque District.

5. Nationwide Permit (NWP) 23 – Approved Categorical Exclusions. A pre-construction notification (PCN) to the District Engineer in accordance with General Condition 32 - PCN is required for all proposed activities under NWP 23.

6. Nationwide Permit (NWP) 27 – Aquatic Habitat Restoration, Establishment, and Enhancement Activities. For all proposed activities under NWP 27 that require pre-construction notification, a monitoring plan commensurate with the scale of the proposed restoration project and the potential for risk to the aquatic environment must be submitted to the Corps. (See “NWP 27 Guidelines” at http://www.spa.usace.army.mil/Missions/RegulatoryProgramandPermits/NWP.aspx).

7. Channelization. Nationwide Permit (NWP) General Condition 9 for Management of Water Flows is amended to add the following: Projects that would result in permanent channelization to previously un-channelized streams require pre-construction notification to the Albuquerque District Engineer in accordance with NWP General Condition 32 – Pre-Construction Notification.

8. Dredge and Fill Activities in Intermittent and Perennial Streams, and Special Aquatic Sites: For all activities subject to regulation under the Clean Water Act Section 404 in intermittent and perennial streams, and special aquatic sites (including wetlands, riffle and pool complexes, and sanctuaries and refuges), pre-construction notification (PCN) to the Albuquerque District Engineer is required in accordance with Nationwide Permit General Condition 32 - PCN.

9. Springs. For all discharges of dredged or fill material within 100 feet of the point of groundwater discharge of natural springs located in an aquatic resource, a pre-construction notification (PCN) is required to the Albuquerque District Engineer in accordance with Nationwide Permit General Condition 32 - PCN. A natural spring is defined as any location where ground water emanates from a point in the ground and has a defined surface water connection to another waters of the United States. For purposes of this regional condition, springs do not include seeps or other groundwater discharges which lack a defined surface water connection.

10. Suitable Fill. Use of broken concrete as fill or bank stabilization material is prohibited unless the applicant demonstrates that its use is the only practicable material (with respect to cost, existing technology, and logistics). Any applicant who wishes to use broken concrete as bank stabilization must provide notification to the Albuquerque District Engineer in accordance with Nationwide Permit General Condition 32 - Pre-Construction Notification along with justification for such use. Use of broken concrete with rebar or used tires (loose or formed into bales) is prohibited in all waters of the United States.

The following regional conditions apply only within the Fort Worth District.

11. For all discharges proposed for authorization under all Nationwide Permits (NWP) into the area of Caddo Lake within Texas that is designated as a "Wetland of International Importance" under the Ramsar Convention, the applicant shall notify the Fort Worth District Engineer in accordance with the NWP General Condition 32 – Pre-Construction Notification (PCN). The Fort Worth District will coordinate with the resource agencies as specified in NWP General Condition 32(d) - PCN.

12. Compensatory mitigation is generally required for losses of waters of the United States that exceed 1/10 acre and/or for all losses to streams that exceed 300 linear feet. Loss is defined in Section F of the Nationwide Permits (NWP). Mitigation thresholds are cumulative irrespective of aquatic resource type at each single and complete crossing. Compensatory mitigation requirements will be determined in accordance with the appropriate district standard operating procedures and processes. The applicant shall notify the Fort Worth District Engineer in accordance with the NWP General Condition 32 - Pre-Construction Notification prior to commencing the activity.

13. For all activities proposed for authorization under Nationwide Permits (NWP) 12, 14 and/or 33 that involve a temporary discharge of fill material into 1/2 acre or more of emergent wetland OR 1/10 acre of scrub-shrub/forested wetland, the applicant shall notify the Fort Worth District Engineer in accordance with the NWP General Condition 32 - Pre-Construction Notification prior to commencing the activity.

14. For all discharges proposed for authorization under Nationwide Permits (NWP) 51 and 52, the Fort Worth District will provide the pre-construction notification (PCN) to the U.S. Fish and Wildlife Service as specified in NWP General Condition 32(d)(2) - PCN for its review and comments.

The following regional conditions apply only within the Galveston District.

15. No Nationwide Permits (NWP), except NWP 3, shall be used to authorize discharges into the habitat types or specific areas listed in paragraphs a through c, below. The applicant shall notify the Galveston District Engineer in accordance with the NWP General Condition 32 - Pre-Construction Notification prior to commencing the activity under NWP 3.

a. Mangrove Marshes. For the purpose of this regional condition, Mangrove marshes are those waters of the United States that are dominated by mangroves (*Avicennia* spp., *Laguncuaria* spp., *Conocarpus* spp., and *Rhizophora* spp.).
b. Coastal Dune Swales. For the purpose of this regional condition, coastal dune swales are wetlands and/or other waters of the United States located within the backshore and dune areas in the coastal zone of Texas. They are formed as depressions within and among multiple beach ridge barriers, dune complexes, or dune areas adjacent to beaches fronting tidal waters of the United States.
c. Columbia Bottomlands. For the purpose of this regional condition, Columbia bottomlands are defined as waters of the United States that are dominated by bottomland hardwoods in the Lower Brazos and San Bernard River basins identified in the 1997 Memorandum of Agreement between the U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, Natural Resource Conservation Service, and Texas Parks and Wildlife Department for bottomland hardwoods in Brazoria County. (For further information, see http://www.swg.usace.army.mil/Business-With-Us/Regulatory/Permits/Nationwide-General-Permits/)

16. A Compensatory Mitigation Plan is required for all special aquatic site losses, as defined in Section F of the Nationwide Permits (NWP), that exceed 1/10 acre and/or for all losses to streams that exceed 200 linear feet. Compensatory mitigation requirements will be determined in accordance with the appropriate district standard operating procedures and processes. The applicant shall notify the Galveston District Engineer in accordance with the NWP General Condition 32 - Pre-Construction Notification prior to commencing the activity.

17. For all seismic testing activities proposed for authorization under Nationwide Permit (NWP) 6, the applicant shall notify the Galveston District Engineer in accordance with the NWP General Condition 32 - Pre-Construction Notification (PCN). The PCN must state the time period for which the temporary fill is proposed, and must include a restoration plan for the special aquatic sites. For seismic testing under NWP 6 within the Cowardin Marine System, Subtidal Subsystem; as defined by the U.S. Fish and Wildlife Service, Classification of Wetlands and Deepwater Habitats of the United States, December 1979/Reprinted 1992, the Corps will coordinate with the resource agencies in accordance with NWP General Condition 32(d) - PCN.

18. For all activities proposed under Nationwide Permits (NWP) 10 and 11 located in vegetated shallows and coral reefs; as defined by 40 CFR 230.43 and 230.44 respectively, the applicant shall notify the Galveston District Engineer in accordance with the NWP General Condition 32 - Pre-Construction Notification. Examples include, but are not limited to: seagrass beds, oyster reefs, and coral reefs.

19. Nationwide Permit 12 shall not be used to authorize discharges within 500 feet of vegetated shallows and coral reefs; as defined by 40 CFR 230.43 and 230.44 respectively. Examples include, but are not limited to: seagrass beds, oyster reefs, and coral reefs.

20. For all activities proposed for authorization under Nationwide Permit 12 that involve underground placement below a non-navigable river bed and/or perennial stream bed there shall a minimum cover of 48 inches (1,219 millimeters) of soil below the river and/or perennial stream thalweg.

21. For all discharges and work proposed below the high tide line under Nationwide Permits (NWP) 14 and 18, the applicant shall notify the Galveston District Engineer in accordance with the NWP General Condition 32 - Pre-Construction Notification (PCN). The Galveston District will coordinate with the resource agencies in accordance with NWP General Condition 32(d) - PCN.

22. For all activities proposed for authorization under Nationwide Permit (NWP) 33 the applicant shall notify the Galveston District Engineer in accordance with the NWP General Condition 32 – Pre-Construction Notification (PCN). The PCN must include a restoration plan showing how all temporary fills and structures will be removed and the area restored to pre-project conditions. Activities causing the temporary loss, as defined in Section F of the NWPs, of more than 0.5 acres of tidal waters and/or 200 linear feet of stream will be coordinated with the agencies in accordance with NWP General Condition 32(d) - PCN.

23. No Nationwide Permits (NWP), except NWPs 3, 16, 20, 22, 37, shall be used to authorize discharges, structures, and/or fill within the standard setback and high hazard zones of the Sabine-Neches Waterway as defined in the Standard Operating Procedure - Permit Setbacks along the Sabine-Neches Waterway. The applicant shall notify the Galveston District Engineer in accordance with NWP General Condition 32 - Pre-Construction Notification for all discharge, structures and/or work in medium hazard zones and all NWP 3 applications within the standard setback and high hazard zones of the Sabine-Neches Waterway.

24. No Nationwide Permits (NWP), except 20, 22, and 37, shall be used to authorize discharges, structures, and/or fill within the standard setback exemptions of the Gulf Intracoastal Waterway as defined in the Standard Operating Procedure- Department of the Army Permit Evaluation Setbacks along the Gulf Intracoastal Waterway. The applicant shall notify the Galveston District Engineer in accordance with NWP General Condition 32 (Pre-Construction Notification) for all discharges, structures and/or work within the standard setback, shoreward of the standard setback, and/or standard setback exemption zones.

25. The use of Nationwide Permits in the San Jacinto River Waste Pits Area of Concern are revoked. (For further information, see http://www.swg.usace.army.mil/Business-With-Us/Regulatory/Permits/Nationwide-General-Permits/)

26. The use of Nationwide Permits 51 and 52 are revoked within the Galveston District boundaries.

27. Nationwide Permit (NWP) 53 pre-construction notifications will be coordinated with resource agencies as specified in NWP General Condition 32(d) – Pre-construction Notification.

28. For all activities proposed under Nationwide Permits (NWP) 21, 29, 39, 40, 42, 43, 44, and 50 that result in greater than 300 feet of loss in intermittent and/or ephemeral streams, as defined in Section F of the NWPs, require evaluation under an Individual Permit.

The following regional conditions apply only within the Tulsa District.

29. Upland Disposal: Except where authorized by Nationwide Permit 16, material disposed of in uplands shall be placed in a location and manner that prevents discharge of the material and/or return water into waters or wetlands unless otherwise authorized by the Tulsa District Engineer.

30. Major Rivers: The prospective permittee shall notify the Tulsa District Engineer for all Nationwide Permit 14 verifications which cross major rivers within Tulsa District. For the purposes of this condition, major rivers include the following: Canadian River, Prairie Dog Town Fork of the Red River, and Red River.

EXHIBIT 2

SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

October 10, 2018

Peter A. Pfohl
Slover & Loftus LLP
1224 Seventeenth Street, NW
Washington, D.C. 20036

Re: FD36186, Texas Railway Exchange LLC—Construction and Operation Exemption—Galveston County, Tex.; Approval of EIS Waiver Request

Dear Mr. Pfohl,

Pursuant to 49 C.F.R. § 1105.6(d), the Surface Transportation Board's (Board) Office of Environmental Analysis (OEA) is granting your October 2, 2018 request for a waiver from the requirements of 49 C.F.R. § 1105.6(a), which generally provide for the preparation of an Environmental Impact Statement (EIS) for a rail construction and operation proposal. OEA is granting the requested waiver based on available information gathered to date, including materials submitted by the petitioner, OEA's consultation with federal, state, and local agencies, and a site visit on August 15, 2018 to the project area.

OEA understands that Texas Railway Exchange LLC (TREX) intends to file a petition seeking exemption from the prior approval requirements of 49 U.S.C § 10901 for the construction and operation of approximately 3,000 feet of new rail line that would extend from the Texas International Terminal facility (the Terminal) on the Galveston Ship Channel to an existing rail line owned and operated by BNSF Railway Company (BNSF) in the City of Galveston, Galveston County, Texas. The Terminal currently receives BNSF rail traffic through a reciprocal switching arrangement with the Union Pacific Railroad Company (UP). The proposed rail line would provide a direct connection between the Terminal and the BNSF rail line and an alternative to the switching arrangement with UP.

From conversations with TREX representatives, OEA understands that the rail traffic levels on the proposed rail line would be fewer than two trains per day, on average. Because rail traffic on the proposed rail line would be diverted from the existing reciprocal switching arrangement with UP, the total volume of rail traffic reaching the Terminal would not increase as a result of TREX's proposal. OEA understands that trains on the proposed rail line would carry a variety of commodities to and from the Terminal, potentially including ethanol and agricultural inputs.

Based on the information available to date, OEA believes that the proposed action would not result in significant environmental impacts and that any impacts could be addressed through appropriate mitigation measures. OEA's opinion is based on the reasons outlined below:

- In June 2018, OEA sent out agency consultation letters to various federal, state, and local agencies. To date, OEA has received responses the U.S. Army Corps of Engineers (the Corps); the Federal Emergency Management Agency (FEMA); the Texas Commission on Environmental Quality (TCEQ); the Natural Resources Conservation Service (NRCS); the Texas Parks and Wildlife Department (TPWD); the City of Galveston; and the Texas Historical Commission (the Texas State Historic Preservation Officer or Texas SHPO). Those comments have not identified potentially significant environmental impacts that could occur as a result of TREX's proposal.

- A wetland delineation was conducted in August 2018 by Spirit, LLC (Spirit), a contractor hired by TREX for two alternative routes identified by TREX. That delineation concluded that, although the proposed rail line would cross areas containing waterways and wetlands, neither of the two alternative routes would affect more than 0.5 acres of aquatic resources. TREX's preferred alternative would impact fewer than 0.1 acres of aquatic resources and would likely qualify for a Corps Nationwide Permit to meet the requirements of Section 404 of the Clean Water Act. During the course of the environmental review process, OEA will review these findings and recommend appropriate mitigation for potential impacts to wetlands and waterways.

- On August 15, 2018, OEA and Burns & McDonnell, OEA's third-party contractor, conducted a site inspection of the proposed project area. The proposed rail line would primarily cross land that has been previously disturbed for industrial and transportation uses. The topography is generally flat and would not require extensive regrading for construction of the proposed rail line. Based on OEA's site inspection and discussions with TREX, soil disturbance during construction would be minimal and would be confined to the proposed rail right-of-way.

- Because much of the project area has been previously disturbed for industrial and transportation uses, very little wildlife habitat remains that could potentially be affected by the proposed rail line. Therefore, the potential for adverse impacts to wildlife species, including federally and state listed threatened and endangered species, is low.

- The proposed rail line would cross Port Industrial Road, a lightly travelled public road that provides access to the Terminal and other industrial facilities along the

Galveston Ship Channel. This would require the construction of a new at-grade crossing on Port Industrial Road. OEA understands that rail traffic at this crossing would be diverted from an existing at-grade crossing that is currently used during UP switching operations. Therefore, impacts to public transportation and safety would be minor and could potentially be beneficial if TREX's proposal results in increased efficiency of rail operations and shorter processing times for trains moving in and out of the Terminal.

- Based on OEA's site inspection and the information provided by TREX, there do not appear to be any residences or other sensitive noise receptors in the project area. The projected traffic on the proposed rail line would not exceed the Board's threshold for detailed analysis of noise during rail operations. Therefore, the potential for significant impacts related to noise is low.

- Because the proposed rail line would not result in an increase in rail traffic in the project area, the potential for impacts to air quality during rail operations is low. If TREX's proposal increases the efficiency of rail operations serving the Terminal, emissions from locomotives could decrease and local air quality could be improved.

- Because rail traffic on the proposed rail line would be diverted from an existing rail line, TREX's proposal is unlikely to result in any changes to transportation of hazardous materials, energy resources, or recyclable commodities.

- There are no known historic properties or archeological sites within or adjacent to the proposed rail right-of-way. The Texas SHPO has submitted comments stating that no historic properties would be affected by TREX's proposal.

- Information collected to date indicates that there would be no significant impacts to transportation systems, land use, energy, air quality, noise, safety, biological resources, or surface or groundwater resources. Nor does OEA anticipate that there would be significant impacts on minority or low-income populations, based on initial site reconnaissance.

After the EA is prepared, OEA will make the document available for a 30-day public review and comment period. Once the comment period ends, OEA will prepare a Final EA that discusses the comments received and includes any additional analysis or appropriate modifications to its analysis. The Final EA will also set forth OEA's recommended mitigation measures for the Board. The Board will then consider the EA, the public comments, and the Final EA recommendations before making its final decision in this proceeding.

If it becomes clear during the environmental review process that potentially significant adverse environmental impacts would results from the project and that these impacts could not

be adequately mitigated, OEA would then prepared a more detailed EIS, as required by the Council on Environmental Quality's regulations and the Board's environmental rules at 49 C.F.R. § 1105.6(a).

If you have any questions or would like to discuss this matter further, please contact Josh Wayland of my staff at (202) 245-0330 or email at waylandj@stb.dot.gov.

Sincerely,

Victoria Rutson, Director
Office of Environmental Analysis

EXHIBIT 3

SLOVER & LOFTUS LLP
ATTORNEYS AT LAW

EI-26313

April 18, 2018

Victoria Rutson, Director
Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Re: Docket No. FD 36186, Texas Railway Exchange LLC –
Construction and Operation Exemption – Galveston County, TX

Dear Ms. Rutson:

By this letter, the Texas Railway Exchange LLC ("TREX") pursuant to 49 C.F.R. § 1105.10(d), requests that the Office of Environmental Analysis ("OEA") approve the use of a third-party consultant which will be selected, supervised, and directed by OEA in the preparation of the environmental documentation required at 49 C.F.R. Part 1105 in connection with the TREX proposed construction in Galveston County, TX. To this end, please note that TREX would not object to the selection of Burns & McDonnell as the third-party consultant, which OEA lists as being pre-approved to assist with environmental documentation.

Sincerely,

Peter A. Pfohl
An Attorney for Texas Railway Exchange LLC

SLOVER & LOFTUS LLP
ATTORNEYS AT LAW

EI-26314

April 18, 2018

Victoria Rutson, Director
Office of Environmental Analysis
Surface Transportation Board
395 E Street, SW
Washington, D.C. 20423-0001

Re: Docket No. FD 36186, *Texas Railway Exchange LLC – Construction and Operation Exemption – Galveston County, TX*

Dear Ms. Rutson:

By this letter, the Texas Railway Exchange LLC ("TREX"), requests that the Office of Environmental Analysis ("OEA") grant a waiver pursuant to 49 C.F.R. 1105.10(c) of the requirement under 49 C.F.R. 1105.10(a) that an applicant meet and provide "written notice of its forthcoming proposal at least 6 months prior to filing its application." Here, waiver of the six month notice requirement is appropriate under the rules as counsel for TREX has met and conferred two separate times with OEA staff as to the environmental and planning considerations for this project and no significant issues were identified; the planned construction is limited in scope as it includes less than 3,000 feet of track; virtually all of the track to be constructed will be located on or next to existing railroad rights-of-way; and the construction will be in areas zoned as either light-industrial or heavy-industrial within the City of Galveston, Texas.

As TREX has communicated to OEA staff, the purpose of the planned construction is to provide the Texas International Terminal ("TIT") and its shippers with efficient, reliable, direct, and permanent access to BNSF's track. Presently, TIT receives both Union Pacific Railroad Company ("UP") and BNSF Railway Company ("BNSF") traffic. However, BNSF serves TIT only through indirect reciprocal switch service provided by UP at added expense to shippers, and under restrictive service and operating rules that that create significant operational, system fluidity, and delay/train turn around issues. The construction project will directly connect TIT and BNSF track and allow trains to reach TIT directly without delay, resulting in significant operational efficiencies for both BNSF and UP connecting train service, improved train service and processing times, and environmental benefits, including through reduced locomotive use and switching time, reduced train turn around times, reduced train blockages, and improved system fluidity.

Please note that TREX plans to engage a third party to work under the supervision of OEA to prepare the environmental documentation, which subject is addressed under a separate letter being sent today to OEA. Based on the limited scope and potential benefits of this project, TREX at this time believes that an Environmental Analysis ("EA") will be appropriate, but will

wait to file a request that an EA as opposed to an Environmental Impact Statement be prepared until the third-party consultant has performed a preliminary site assessment as directed by OEA.

For the above stated reasons, TREX requests that you grant the waiver of the six month notice requirement under 49 C.F.R. 1105.10(c).

Please contact the undersigned if you have any questions or require additional information. We look forward to working with OEA to complete the environmental review process for this project.

Sincerely,

Peter A. Pfohl
An Attorney for Texas Railway Exchange LLC

EXHIBIT 4

SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

April 23, 2018

Peter Pfohl, Esq.
Slover & Loftus LLP
1224 Seventeenth St. N.W.
Washington, D.C. 20036

Re: FD 36186, Texas Railway Exchange LLC—Galveston County, Tex.; Waiver of Six-Month Prefiling Notice

Dear Mr. Pfohl:

Pursuant to 49 CFR 1105.10(c), we are granting your request of April 18, 2018 for waiver of the six-month pre-filing notice generally required for construction projects under 49 CFR 1105.10 (a)(1). As discussed below, applicant Texas Railway Exchange (TREX) has explained, based on information known at this time, the anticipated environmental effects of the proposed action, and the timing of the proposed action, and that all or part of the six-month lead period is not appropriate in this proceeding.

The Surface Transportation Board's Office of Environmental Analysis (OEA) met and consulted with the representatives of TREX on April 12, 2018. TREX discussed with OEA its plan to construct and operate approximately 2600 feet of rail line in Galveston County, Texas. The new rail line would provide a direct connection between the Texas International Terminal in the City of Galveston and BN Railway Company. TREX also provided OEA with an overview of the project and supplied OEA with additional information regarding potential environmental consequences know to date. OEA explained to TREX details of the environmental review process. Finally, TREX told OEA that it intends to file a petition for exemption to construct and operate the proposed rail line with the Surface Transportation Board to initiate the formal proceeding with the agency.[1]

[1] To build an extension of a rail line or to construct and operate a new rail line, a rail carrier must first apply to the STB for authority. Most carriers file, as an initial pleading, a Petition for Exemption under 49 U.S.C. 10502 from the formal application procedures of 49 U.S.C. 10901. The Petition for Exemption does not exempt rail applicants from any part of the required environmental review.

The information provided by TREX is sufficient for OEA to conclude that TREX has met the standards set forth in 49 CFR 1105.10(c) and is knowledgeable about the environmental review process. OEA grants your request to waive the six-month prefiling notice.

If we can be of further assistance, please contact me or Josh Wayland of my staff at (202) 245-0330.

Sincerely,

Victoria Rutson
Director
Office of Environmental Analysis

SURFACE TRANSPORTATION BOARD
Washington, DC 20423

Office of Environmental Analysis

April 23, 2018

Peter Pfohl, Esq.
Slover & Loftus LLP
1224 Seventeenth St. N.W.
Washington, D.C. 20036

Re: FD 36186, Texas Railway Exchange LLC—Galveston County, Tex.; Approval of Third-Party Consultant

Dear Mr. Pfohl:

The Surface Transportation Board's Office of Environmental Analysis (OEA) is approving your request under 49 CFR 1105.10(d) to retain Burns & McDonnell (B&M) as the independent third-party consultant for the above referenced project. B&M will assist OEA to prepare the appropriate environmental document in connection with a proposal by Texas Railway Exchange LLC (TREX) to construct and operate a rail line of approximately 2,600 feet in length in Galveston County, Texas. The proposed rail line would provide rail service to the Texas International Terminal, in the City of Galveston.

We have attached a disclosure statement that we ask you to forward to B&M to complete then forward to us. As we discussed in our meeting on April 12, 2018, the Board's Office of Environmental Analysis will directly supervise, review, and approve all environmental documents prepared by the independent third-party contractor.

If we can be of further assistance, please do not hesitate to contact me or Josh Wayland of my staff at (202) 245-0330.

Sincerely,

Victoria Rutson
Director
Office of Environmental Analysis